Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-492

J. JAMES EXON, Governor of the State of Nebraska, and ALLEN J. BEERMANN, Secretary of State of the State of Nebraska,
Appellants,

v.

EUGENE J. McCARTHY, HARRY G. MENDELSON, EDWIN H. GARRISON, JR., PAT L. WATKINS and MALCOLM W. PAINE,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

ANSWER TO JURISDICTIONAL STATEMENT

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INDEX

TABLE OF CONTENTS

Page

Motion to Affirm Decision Below and for Reasonable Fees and Costs 1

Opinion Below 2

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Statement of the Case 2

Argument:

V. This Court Should Award Reasonable Fees and Costs. 4

TABLE OF CITATIONS

Cases

Alyeska Pipeline Service v. Wilderness Society, 421 US 240, 44 L.Ed. 2d 141 (1975) 4

McCarthy v. Brisco, No. A-247, Oct. 1, 1975, 45 USLW 3244 (30 September 1976). 4

Scheuer v. Rhodes, 416 US 232, 40 L.Ed. 2d 90 (1974). 3,5

Sterling v. Constantin, 287 US 378, 77 L.Ed. 575 (1932). 3

Storer v. Brown, 415 US 724, 39 L.Ed. 2d 714 (1974). 3,4

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MOTION TO AFFIRM DECISION BELOW AND FOR REASONABLE FEES AND COSTS

Appellees move this Honorable Court, pursuant to Rule 16 (1) (c), to affirm summarily the judgment of the U.S. District Court for Nebraska on the grounds that the legal positions of the Appellants are contrary to settled law in this Court, that there is no basis for the Appellants' attempted

defense of a legal provision this Court has characterized as an "inconceivable policy," and to award reasonable attorneys fees and costs to attorneys for Appellees.

OPINION BELOW

The opinion below of the three-judge Court has been provided by the Appellants in their Jurisdictional Statement.

JURISDICTION

Appellees agree that this Court has jurisdiction, as set forth by Appellants.

STATUTES INVOLVED

Appellees agree with the statement of Statutes Involved by Appellants.

QUESTIONS PRESENTED

Appellees submit on the four questions presented by the Appellants, but add a fifth question:

5. Where, as here, Appellants raise a legal position with settled law contrary, with knowledge on the record of that law, and with no realistic possibility of success, should attorneys' fees and costs be awarded on *per curiam* affirmance?

STATEMENT OF THE CASE

Appellees adopt the Appellants' Statement of the Case.

ARGUMENT

It has been settled law for 68 years in this Court that a citizen may sue state officials in federal court under circumstances such as those present here.

> "[S]ince Ex parte Young, 209 US 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law."

Scheuer v. Rhodes, 416 US 232, at 237; 40 L.Ed. 2d 90, at 97 (1974). The extensive quotation from *Young* in *Scheuer, ibid*, and from *Sterling v. Constantin*, 287 US 378, 77 L.Ed. 575 (1932) at *id*, US pps. 248-249; L.Ed., pps. 103-104, make it crystal clear that the position of the Appellants, here, on immunity, is totally incorrect.

Scheuer, which Appellants cite in their Statement, at p. 8, is the latest and most comprehensive statement on this question. Immediately after the statement in *Scheuer* which sets forth the Appellants' general position, and *on the same page*, appear the references to *Young* and *Sterling*, which show that the Appellants are within the exception of this general rule. Since the Appellants cited *Scheuer*, they either read it or are presumed to have read it, and are aware of the law on immunity.

The substantive law on the arbitrary exclusion of an independent candidate for president from any state ballot is equally clear. The Court below cited the leading case on point, *Storer v. Brown*, 415 US 724, 39 L.Ed. 2d 714 (1974). While

there was a dissent in *Storer* as to the remedy, this Court should note there was neither dissent nor any mental reservation whatever that a state may not constitutionally compel an independent candidate to become a party man in order to qualify for the ballot. California only advanced the contrary to that as an alternative argument in *Storer*. In the instant case, the Nebraska statutes flatly prohibit an independent candidacy for president.

It was precisely such a position that this Court agreed was an "inconceivable policy", in *McCarthy v. Briscoe*, 45 USLW 3244 (30 Sept. 1976). See also the cases there cited from Florida and Delaware.

The Appellants' questions I to IV are jointly and fully answered by the above discussion, and cases there cited. The last question regards fees and costs.

V.

THIS COURT SHOULD AWARD REASONABLE FEES AND COSTS.

This Court has seen, in its own docket, the tip of the iceberg of the litigation brought by many attorneys, in many jurisdictions, on many issues, on behalf of Senator McCarthy. In the midst of these efforts, some of his attorneys were compelled to set aside pressing, and legitimately contested matters, in order to answer the statement of Appellants.

The latest (and most comprehensive) statement on the award of attorneys' fees and costs in federal courts is found in *Alyeska Pipeline Service v. Wilderness Society*, 421 US 240, 44

L.Ed.2d 141 (1975). The exception to the "American Rule" of not allowing attorneys' fees and costs which applies here, is when a party makes a totally untenable argument, discriminates, is obdurate, or acts for purposes of delay or harrassment only.

Appellees ask the Court to determine whether the Appellants have appealed with no semblance of just cause. If so, Appellees request that reasonable fees and costs be awarded against the individual Appellants, pursuant to *Scheuer, supra.*

Respectfully submitted,

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